Hazraf Ali bin Hassan v Public Prosecutor

HIGH COURT (TEMERLOH) — CRIMINAL APPEAL NO 42S-12 OF 2010
AKHTAR TAHIR J
20 JUNE 2011

Criminal Procedure — Charge — No offence disclosed — Accused charged with corruptly soliciting and receiving money — Failure to state for whom corrupt money was sought for — Whether accused prejudiced — Whether defect/error material under s 156 of the Criminal Procedure Code — Whether retrial appropriate — Anti-Corruption Act 1997 s 10(a)(aa)

The appellant was convicted after trial by the sessions court on two charges under s 10(a)(aa)of the Anti-Corruption Act 1997 ('the Act') and sentenced to three months jail and fined RM10,000 in default six months jail. He was alleged, on the first charge, to have corruptly solicited RM2,000 cash from an individual (SP2) as an inducement to obtain a licence from the Bentong District Council for a carnival organised by SP2's company. On the second charge, the appellant was alleged to have corruptly received the said sum from SP2 via a third party for the same purpose. The appellant appealed to the High Court against conviction and sentence. The appeal turned on the propriety of the charges.

Held, allowing the appeal and setting aside the conviction and sentence:

(1) The charges were totally silent as to for whom the corrupt money was being sought for by the accused. Section 10 of the Act did not envisage helping another person to gain something and being rewarded in return to be corruption. It was only corruption if the money was to gratify another person to do or abstain from doing something (see para 12).

(2) What was missing from the charge was supplanted by evidence that the money was solicited by the accused to gratify the district officer whom the accused held out to be his good friend and whom he could convince to give the licence for the carnival. To amount to an offence of corruption, this very material fact should have been incorporated in the charge to satisfy the requirements of the Criminal Procedure Code ('CPC') and give the accused sufficient notice of the offence committed by him (see paras 13–14).

(3) Section 156 of the CPC had no application as the defect in the charge not only amounted to an error but also did not disclose any known offence.

The accused was greatly prejudiced by being ignorant of the actual nature of the offence committed by him and was unable to defend himself properly (see paras 21–22 & 24).

(4) The prosecution's evidence did not reveal the role played by the district officer in the case. As such the district officer could have been a material witness and an inference in favour of the accused should be made (see para 19).

(5) A retrial was ruled out as that would be giving the prosecution a second bite of the cherry especially as they had failed to call a material witness at the trial (see para 25).

(6) As the district officer was an officer of a public body, the proper charge should have been under s 10(a)(bb) of the the Act (see para 20).

[Bahasa Malaysia summary

Perayu disabitkan selepas perbicaraan oleh mahkamah sesyen atas dua tuduhan di bawah s 10(a)(aa) Akta Badan Pencegah Rasuah 1997 ('Akta') dan dihukum tiga bulan penjara dan didenda RM10,000 jika ingkar enam bulan penjara. Dia didakwa, atas tuduhan pertama, telah secara korup meminta wang tunai RM2,000 daripada individu ('SP2') sebagai pendorong untuk memperolehi lesen daripada Majlis Daerah Bentong untuk karnival yang diuruskan oleh syarikat SP2. Atas tuduhan kedua, perayu didakwa telah secara korup menerima wang tersebut daripada SP2 melalui pihak ketiga untuk tujuan yang sama. Perayu merayu kepada Mahkamah Tinggi terhadap sabitan dan hukuman tersebut. Rayuan tersebut adalah mengenai kesesuaian tuduhan-tuduhan tersebut.

Diputuskan, membenarkan rayuan dan mengenepikan sabitan dan hukuman:

(1) Tuduhan-tuduhan tersebut sama sekali tidak menyatakan untuk siapa wang korup yang dipohon oleh tertuduh tersebut. Seksyen 10 Akta tidak membayangkan menolong orang lain untuk mendapatkan sesuatu dan diberi ganjaran sebagai balasan untuk menjadi rasuah. Ia semata-mata korup jika wang tersebut untuk memuaskan orang lain untuk berbuat sesuatu atau untuk menahan diri daripada membuat sesuatu (lihat perenggan 12).

(2) Apa yang tiada dalam tuduhan digantikan oleh keterangan bahawa wang diminta oleh tertuduh untuk memuaskan pegawai daerah, orang yang tertuduh katakan sebagai rakan baiknya dan orang yang boleh dia yakinkan untuk memberi lesen untuk karnival. Untuk meniadi kesalahan rasuah, fakta material ini patut dimasukkan di dalam tuduhan untuk memuaskan kehendak-kehendak Kanun Acara Jenayah ('KAJ') dan memberi tertuduh notis yang mencukupi terhadap kesalahan yang dilakukan olehnya (lihat perenggan 13–14).

(3) Seksyen 156 KAJ tidak beraplikasi memandangkan kecacatan di dalam tuduhan bukan sahaja berjumlah kepada kesalahan tetapi juga tidak mengemukakan apa-apa kesalahan yang dikenali. Tertuduh diprejudis apabila tidak tahu sifat sebenar kesalahan yang dilakukan olehnya dan tidak dapat membela dirinya (lihat perenggan 21–22 & 24).

(4) Keterangan pihak pendakwaan tidak menunjukkan peranan yang dimainkan oleh pegawai daerah dalam kes ini. Oleh itu pegawai daerah boleh menjadi saksi material dan inferens memihak tertuduh patut dibuat (lihat perenggan 19).

(5) Perbicaraan semula adalah diketepikan memandangkan ia akan memberikan pihak pendakwaan peluang kedua terutamanya kerana mereka gagal untuk memanggil saksi material pada masa perbicaraan (lihat perenggan 25).

(6) Memandangkan pegawai daerah adalah pegawai badan awam, dakwaan yang wajar sepatutnya di bawah s 10(a)(aa) Akta (lihat perenggan 20).]

Notes

For cases on no offence disclosed, see 5(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1445–1452.

Cases referred to

C Mohammad v PP [1974] 1 MLJ 25 (refd)
PP v Lee Pak [1937] MLJ 265 (folld)
PP v Teoh Choon Teck [1963] MLJ 34 (refd)
Yoh Meng Heng v PP [1970] 1 MLJ 14 (refd)

Legislation referred to

Anti-Corruption Act 1997 (repealed by the Anti-Corruption Commission Act 2009) s 10, 10(a)(aa), (a)(bb)
Criminal Procedure Code ss 152, 153, 154, 156

Wan Azmir bin Wan Majid (Mohd Hafarizam bin Harun and Abu Bakar bin Isa Ramat with him) (Hafarizam Wan & Aisha Mubarak) for the appelant.
Mohd Baharuddin bin Ahmad Kassim (Deputy Public Prosecutor, Malaysian Anti-Corruption Commission) for the respondent.

Akhtar Tahir J:

[1] The accused in this case was charged as follows:

Pertuduhan Pertama:

Bahawa kamu pada 14/7/2004, jam lebih kurang 2.00 petang, di Tapak Karnival, Medan Selera Kampung Baru, Bentong di dalam daerah Bentong, di dalam negeri Pahang, secara rasuah telah meminta daripada Mohamed Syed Basri Baskaran bin

Abdullah wang tunai RM2,000.00 sebagai satu dorongan untuk kamu mendapatkan Iesen perniagaan Karnival Amal untuk Syarikat IZZH EVENT ORGANISER dari Majlis Daerah Bentong, oleh itu kamu telah melakukan satu kesalahan di bawah seksyen 10(a)(aa), Akta Pencegahan Rasuah 1997 (Undang-Undang Malaysia No.575) dan boleh dihukum di bawah seksyen 16, Akta yang sama.

Pertuduhan Kedua:

Bahawa kamu pada 15/7/2004, jam lebih kurang 6.30 petang, di No. 115, Rumah Murah, Batu 1, Jalan Tras, Bentong di dalam daerah Bentong, di dalam negeri Pahang, secara rasuah telah menerima wang tunai sebanyak RM2,000.00 daripada Mohamed Syed Basri Baskaran bin Abdullah melalui Sarrulnizam bin Md Supiah, sebagai satu dorongan untuk kamu mendapatkan Iesen perniagaan Karnival Amal untuk Syarikat IZZH EVENT ORGANISER dari Majlis Daerah Bentong, oleh itu kamu telah melakukan satu kesalahan di bawah seksyen 10(a)(aa), Akta Pencegahan Rasuah 1997 (Undang-Undang Malaysia No.575) dan boleh dihukum di bawah seksyen 16, Akta yang sama.

[2] At the end of a full trial the accused was found guilty and convicted for both charges and sentenced to a three months imprisonment term and a fine of RM10,000 in default of payment to a six months imprisonment term.

[3] The prosecution had called a total of nine witnesses and a sum total of the evidence showed that the accused had on the 14 July 2004 solicited a sum of RM5,000 from the complainant by the name of Mohamed Syed Basri Baskaran bin Abdullah ('SP2') as an inducement to get a license from the Majlis Daerah Bentong for a carnival organised by the complainant's company by the name of IZZH EVENT ORGANISER. Subsequently on the 15 July 2004 the accused received a sum of RM2,000 from the complainant via Sarrulnizam bin Md Suppian ('the first accused') for the same purpose.

[4] As a matter of record the first accused was acquitted at the end of the defence case and there was no appeal against this acquittal by the public prosecutor.

THE CHARGE

[5] This appeal was determined not very much on the evidence led by the prosecution but more on the issue as to the propriety of the charge itself.

[6] I took guidance from what was stated by Whitley AG CJ in the case of *PP v Lee Pak* [1937] MLJ 265 (FMSR) 265:

> Before dealing with the evidence I should like to make some observations upon the subject of the framing of charges. I have had to deal with a number of criminal appeals lately, and I have observed that in the several cases the charges have been carelessly drawn. Prosecuting officers should devote great care to this part of the preparation of their cases, studying and following the provisions of Chapter XVIII of the Criminal Procedure Code. It is seldom sufficient to copy the section under which the charge is being laid slavishly word for word. The wording must be adapted to the facts of the particular case. The charge should show the accused exactly and with particularity the case which he has to meet, and should not leave him guessing as to which of a variety of alternatives he is alleged to have offend against It is desirable that before the charge is put to the accused the magistrate should satisfy himself as to whether in his opinion it is on the face of it properly framed; and if at the close of the case for the prosecution or indeed at any other stage of the trial it becomes apparent to him from the evidence that the charge should be altered, s 158 of the Criminal Procedure Code gives him the power to alter it or to add to it at any time before judgment, provided always that such alteration or addition is read to the accused. In the present case there were obvious defects on the fact of the charge. It did not alleged that the respondent was driving a motor vehicles which was an essential ingredient to constitute an offence under the section; it apparently alleged that the thoroughfare and not the vehicle was in a dangerous condition and it alleged that the steering was 'similar' which is not a word which should appear in a formal charge. It was not suggested that these errors in wording in any way misled the accused, so that they are covered by s 156 of the Criminal Procedure Code which provides that such errors shall not be regarded as material. Prosecuting officers should none the less bear in mind that if it should appear to an appellate court that an accused person was in fact misled, that will of itself justify the quashing of a conviction.

[7] The first matter which I dealt with is the manner in which the charge was drafted. The basic principles in the drafting of a charge must necessarily kick off from the reading of the provisions of the Criminal Procedure Code ('CPC').

[8] For ease of reference the relevant provisions of the CPC are put out in full:

(a) Section 152
Form of charge

(1) Every charge under this Code shall state the offence with which the accused is charged.

(2) If the law which creates the offence given it any specific name offence may be described in the charge by that name only.

(3) If the law which creates the offence does not give it any specific name so much of the the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

(4) The law and section of the law against which the offence is said to have been committed shall be mention in the charge.

(5) The fact in the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charges was fulfilled in the particular case.

(6) If the accused has been previously convicted of any offence, and it is intended to prove that previous conviction for the purpose of increasing the punishment which the Court in competent to award, the fact, date and place of the previous conviction shall be stated in the charge, if the statement is omitted the Court may add it at any time before sentence is passed.

(b) Section 153

Particulars as to time, place and person

(1) The charge shall contain such particulars as to the time and place of the alleged offence and the person, if any, against whom or the thing, in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charge.

(2) When the accused is charged with criminal breach of trust or dishonest misappropriation of money it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed and the dates between which is offence is alleged to have been committed, without specifying particular item or exact dates, and the charge so framed shall be deemed to be charge of one offence within the meaning of section 164:

Provided that the time included between the first and the last of such dates shall not exceed one year.

(c) Section 154

When manner of committing offence must be stated

When the nature of the case is such that the particulars mentioned in section 152 and 153 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which is alleged offence was committed as will be sufficient for that purpose.

[9] As a summarisation of the relevant requirements of the charge is that the charge must first act as a statement that all legal conditions required by law to constitute the offence charged has been fulfilled, secondly all persons relevant should be mentioned in the charge so as to give sufficient notice to the accused of the matter which he is charged and where necessary the manner in which the offence was committed should be stated.

[10] The offence for which the accused was charged in this case under s 10(a)(aa) of the Anti-Corruption Act 1997 which read as follows:

> Offence of accepting gratification
>
> 10 Any person who by himself, or by or in conjunction with any other person —
>
> (a) corruptly solicits or receives or agree to receive for himself or for any other person; or
>
> (b) corruptly gives, promises or offers to any person whether for the benefit of that person or of another person.
>
> Any gratification as an inducement to or a reward for, or otherwise on account of —
>
> (aa) any person doing or forbearing to do anything in respect of any matter of any transaction, actual or proposed or likely to take place; or
>
> (bb) any officer or a public body doing or forbearing to do anything in respect of any matter or transaction, actual or proposed or likely to take place, in which the public body is concerned,
>
> Shall be guilty of an offence.

[11] It is clear from the reading of the above provision that to constitute an offence the soliciting or receipt of corrupt money by the accused must be on account of some other person doing or forbearing to do a certain act.

[12] In this case the charge is totally silent as to for whom the corrupt money is being sought for by the accused apart from stating that the money is solicited and received to get a license from the Majlis Daerah Bentong. Surely s 10 of the Act above does not envisage helping another person to gain something and being rewarded in return to be corruption. It only becomes corruption if the money is to gratify another person to do or abstain from doing something.

[13] What is missing from the charge has been supplanted by evidence led by the prosecution witnesses which seeks to enlighten that the money was actually solicited by the accused for the purpose of gratifying the district officer whom the accused had held out to the complainant to be a good friend of his and whom he could convince to give the license for the carnival.

[14] To amount to an offence of corruption this very material fact should have been incorporated in the charge to satisfy the requirements and provisions of the CPC and give sufficient notice to the accused of the offence committed by him.

[15] To quote from Ong Hock Sim J in the case of *Yoh Meng Heng v PP* [1970] 1 MLJ 14 at p 15 where His Lordship stated as follows:

> It is essential that a person accused of a charge should be given sufficient particulars to know just what the charge against him is, so that he may rebut it. It is embarrassing to the defence not to know just what he has alleged to contravened.

[16] In *PP v Teoh Choon Teck* [1963] MLJ 34 Hepwort J at p 35 stated thus:

> If there be any one principle of criminal law and justice clearer and more obvious than all others, it is that the offence imputed must be positively and precisely stated, so that the accused may certainly know with what he is charged, and be prepared to answer the charge as best he may.

[17] Two more issues arise in connection with these missing facts from the charge are whether the district officer for whom the corrupt money was sought a material witness and secondly as the district officer was an officer of a public body then the proper charge should be under s 10(a)(bb) and not as charged.

IS THE DISTRICT OFFICER A MATERIAL WITNESS?

[18] On the first issue whether the district officer is a material witness would depend on whether he was aware of the accused liaisons with the complainant using his name. If he was aware then not only is he a material witness but an accomplice as well. However if he is unaware of his name being used by the accused his presence would be of no benefit to the court. To determine the district officers complicity in this case I looked at the evidence o fthe investigating officer.

[19] The evidence of the investigating officer did not reveal the role played by the district officer in this case. As such the district officer could have been a material witness and an inference in favour of the accused should be made.

THE CORRECT PROVISION

[20] On the second issue I agreed with the submissions of the defence counsel that the proper charge should be under s 10(a)(bb) of the Anti-Corruption Act 1997.

EFFECT OF A DEFECTIVE CHARGE

[21] I am aware of s 156 of the CPC which provides as follows:

> No error in stating either the offence or the particulars required to be stated in the charge, an no omission to state the offence or those particular shall be regards, at any stage of the case, as material unless the accused was in fact misled by that error or omission.

[22] I am not convinced that this section applies here as the defect in the charge in this case does not only amount to an error but beyond that, it does not disclose any known offence.

[23] As stated by Syed Agil Barakbah J in the case of *C Mohammad v PP* [1974] 1 MLJ 25 at p 26:

> Since the charge does not disclose any offence known to law, it is not necessary nor desirable for me to consider the provisions of the Criminal Procedure Code as urged by the learned deputy public prosecutor because there is an apparent miscarriage of justice.

[24] Even if the above provisions apply I feel the accused has been greatly prejudiced by being ignorant of the actual nature of the offence committed by him. As such he would be unable to properly defend himself.

[25] I also ruled out a retrial as that would be tantamount of giving the prosecution a second bite of the cherry especially as they had failed to call a material witness at the first trial.

[26] In the upshot I allowed the appeal of the accused and set aside the conviction and sentence of the lower court.

Appeal allowed and conviction and sentence set aside.

Reported by Ashok Kumar